RECORD
AND
BRIEFS

SUPREME COURT, U.S.
FILED
MAY 19 2011
OFFICE OF THE CLERK

No. 10-1260

In the Supreme Court of the United States

Clinton Gard,
Patricia Gard,
Petitioners

vs

City of Omaha,
Respondent

On Petition for Writ of Certiorari to the
Nebraska Court of Appeals

Reply Brief of Petitioners

Clinton and Patricia Gard
Pro Se Petitioners
931 N 121 St.
Omaha, NE 68154
(402) 342-3150

Library of Congress
Law Library

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

INTRODUCTION..... 1

ARGUMENT..... 2

CONCLUSION 12

TABLE OF AUTHORITIES

Celotex Corp. v. Catrett 477 U.S. 317, 106 S.Ct. 2548..... 4

Frezell v. Iwersen 436 N.W. 2d 194, 231 Neb. 365..... 3

Greer v. Chelewski, 76 N.W. 2d 438, 162 Neb 450..... 9

Kenney vs. Swift Transportation Co. 347 F.3D 1041, 1044 8th Cir 2003..... 3

Mathews v. Eldrige, 424 U.S 319, 348 (1976)..... 8

Olsen v. Olsen, 657 N.W.2d 1, 8 (Neb. 2003)..... 3

State v. Ryan, 233 Neb. 74, 444 N.W.2d 610 (1989)..... 9

Stinson v. City of Lincoln, 9 Neb. App. 642, 617 N.W.2d 456 (2000)..... 8, 12

Waite v. City of Omaha, Douglas Co District Court 1001-116, also Nebr Supreme Court S01-193..... 6

STATUTORY AUTHORITIES

244 U.S.App.D.C., at 167-168, 756 F.2d, at 189 (Bork, J.,dissenting); 10A C. Wright,A. Miller, & M. Kane 4

Omaha Municipal Codes:
(Code 1980, §26-28)..... 8, 11
(Code 1980, §26-59)..... 8, 11
(Code 1980, §26-60)..... 8, 11
(Code 1980, §18-2, Sec 18-2-18-5) 8

REPLY BRIEF FOR PETITIONERS

Introduction

The basis of Respondent's arguments allege that 1) Petitioners filed a claim pursuant to the Nebraska Political Tort Claims Act with the city 6 months too late pursuant to the Nebr. Political Tort Claims Act; 2) there are no circumstances that provide for estoppel or waiver; 3) summary judgment was proper; 4) so therefore no constitutional issues exist.

Respondent denies the existence of an extensive record of relevant facts before the lower courts to stay within parameters leading to the strictest application the statute of limitations. Unfortunately the lower courts have followed suit thereby eliminating the necessity of the Respondent to answer to a large portion of the record.

However when all facts on record come into the light this Court will be shown compelling facts and circumstances of this case overwhelmingly create a federal question, violate Petitioners' right to due process, satisfy the requirements of Supreme Court Rule 10 and warrant review by this court.

ARGUMENT

THE ISSUES CREATE A CONSTITUTIONAL QUESTION THAT IS FAR REACHING AS THE OPINION OF THE NEBRASKA COURT OF APPEALS IS PUBLISHED AND MAY AFFECT FUTURE CASES.

The Opinion could be used in future cases regarding the rights of others involved in cases involving summary judgment being granted during ongoing court ordered discovery. (App. 1)

Within this Opinion, the Court of Appeals acknowledges that estoppel can be applied to the statute of limitations. (App. 12)

This Opinion acknowledges there are documents still being obtained under ongoing court ordered discovery when summary judgment was entered. These documents were not yet before the court. Then, however, the Nebraska Court of Appeals crosses the line of accepted judiciary standards concerning summary judgment and proceeds to weigh the unseen evidence by stating, "This additional evidence could not have affected the time of the filing of their claim or the time they knew they had a claim, i.e., after the first accident on October 21, 2006." (App. 15)

This action violates Petitioners' right to due process under U.S. Const., Art. XIV, §1 as we are entitled to a fair hearing before an impartial judge.

Nebraska law also provides that "when ruling on a motion for summary judgment, a court must not weigh evidence or make credibility determinations." *Kenney vs. Swift Transportation Co. 347 F.3D 1041, 1044 8th Cir 2003.*

As Petitioners discovered after this Opinion was published there was evidence being withheld from Petitioners during court ordered discovery concerning a prior court order concerning the rights of abutting property owners to the project (App. 51), definitely triggering estoppel because "Equitable estoppel may be applied to prevent an inequitable resort to a statute of limitations. . . and a defendant may, by his or her representations, promises, or conduct, be so estopped where the other elements of estoppel are present." *Olsen v. Olsen, 657 N.W.2d 1, 8 (Neb. 2003)* and "One who conceals material facts, which delays filing of suit, cannot avail himself of statute of limitations defense." *Frezell v. Iwersen 436 N.W. 2d 194, 231 Neb. 365. C.A. 8 (Neb.) 1991.*

The record clearly reveals Respondent was aware of a possible claim 5 years prior to the damages occurring, violated notice laws, concealed knowledge of dangerous conditions being created due to a planned increase in traffic volume in conjunction with the construction of the improvements, misrepresented that the federal government prohibited changes to the intersection, and engaged in the appearance of working toward a solution with the Nebraska Department of Roads

thereby fulfilling all elements necessary for estoppel. The facts clearly show no argument left for a statute of limitations defense.

THE UNITED STATES SUPREME COURT PROVIDES GUIDANCE REGARDING EVIDENCE NOT YET BEFORE THE DISTRICT COURT WITHIN THE MOST CURRENT FEDERAL CASE LAW REGARDING SUMMARY JUDGMENT.

In *Celotex Corp. v. Catrett 477 U.S. 317, 106 S.Ct. 2548* this court states, "Our conclusion is bolstered by the fact that district courts are widely acknowledged to possess the power to enter summary judgments sua sponte, so long as the losing party was on notice that she had to come forward with all of her evidence. See *244 U.S.App.D.C., at 167-168, 756 F.2d, at 189 (Bork, J.,dissenting); 10A C. Wright,A. Miller, & M. Kane)*

The decision of the Douglas County District Court to grant summary judgment during a sustained ongoing court ordered discovery can be considered to be rendered "sua sponte" as there were no further instructions from the court, motions, hearings or stipulations regarding the sustained motion to compel discovery that was concurrently granted at the time of taking Respondent's motion for summary judgment under advisement. The granting of summary judgment occurred 2 months (E22:23-24 V. I) (T337) from the date from granting motion to compel discovery.

This is not an unreasonable time for ongoing discovery. Documents were obtained only four days prior to Petitioners receiving the Order in the mail granting summary judgment to Respondent.

Additionally, the Order of the District Court granting summary judgment in favor of Respondent does not make any reference to the ongoing court ordered discovery. (App. 16) The district court stated that a waiver can apply to the statute of limitations, therefore evidence could be (and was) produced that could affect the timing of the claim. (App. 36, 12-20). The court also stated there was an ongoing obligation to provide documents requested by Petitioner's Motion to Compel Discovery. (App. 49 8-13, App. 50 20-23) As a result genuine issues still existed and summary judgment was premature, improper, and unjust because Petitioners, as the losing party, were not put on notice by the Douglas County District Court to come forward with all of their evidence.

RESPONDENTS WERE PUT ON NOTICE BY AN ORDER FROM THE DOUGLAS COUNTY DISTRICT COURT IN 2001 THAT FUTURE CLAIMS MAY ARISE FROM ABUTTING PROPERTY OWNERS TO THE PROJECT.

In retrospect the error of the district court prematurely ending court ordered discovery becomes grave and manifestly unjust in the light of the discovery of the Respondent withholding documents pertaining to a prior lawsuit filed in the

Douglas County District involving the Development Agreement including the Improvements by Petition abutting Petitioner's property. The court order addressed issues concerning rights of abutting property owners to the project that included the street improvements by petition. The order of the Douglas County District Court in *Waite v. City of Omaha, Douglas County District Court 1001-116, See also Nebr. Supreme Court S01-193* put the Respondent City of Omaha on notice in 2001 that future claims for damages from abutting as well as non-abutting owners in special circumstances may arise from the project that included vacating a street in addition to the street improvements abutting Petitioners' property. (App. 56-64)

Petitioners attached the newly discovered court order to their Emergency Motion to Reinstate Appeal and Emergency Motion to Amend Petition for Further Review and Stay the Mandate. (Apps. 21, 51) Both motions were procedurally overruled with no rebuttal or opposition from the Respondent or any written analysis from the Nebraska Court of Appeals or the Nebraska Supreme Court., further denying Petitioners' due process rights for a fair hearing regarding this exceptional discovery.

From this point the facts dispel all doubt that summary judgment is improper and the Respondents can no longer rely on the argument that Petitioners simply filed their claim six months late in the light of overwhelming negligence and

ongoing, intentional misrepresentation by Respondent.

We believe this court should issue an opinion stating that summary judgment never be granted during ongoing court ordered discovery with no further instructions, hearings, motions, or stipulations within a reasonable time to prevent summary judgment from being prematurely granted in other cases such as this.

OTHER STATE COURTS OF APPEAL ARE IN CONFLICT WITH THE DECISIONS OF THE NEBRASKA COURTS TO GRANT SUMMARY JUDGMENT BEFORE DISCOVERY IS COMPLETED. See Petition Pages 10-12.

PETITIONERS RAISED CONSTITUTIONAL ISSUES OF DUE PROCESS VIOLATIONS IN THE PROCEEDINGS BELOW

Petitioners raised constitutional questions concerning loss of due process rights within their original claim for damages and within their complaint filed in the district court. Respondent alleges that a constitutional issue was not raised in the lower proceeding, (Brief in Opp. Page 15) while just 10 pages earlier admits that as early as within Petitioners' claim for damages that Petitioners "alleged the Respondent is responsible for the damage to their residence, the diminution of value of their property, and the loss of use and enjoyment

of their backyard." (Brief in Opp. Page 5) These claims obviously fall under the rights protected by Art. XIV, §1 as the right to quiet enjoyment and feeling secure on your own property is a fundamental right deeply rooted in American society. (Omaha Mun. Code 1980, §18-2, Sec 18-2-18-5 See App. 32-33) These claims were included within the complaint that was before the Douglas County District Court and in the record before the Nebraska Court of Appeals. (App. 65)

Petitioners also alleged a violation of due process rights before the district court by providing evidence that Respondent failed in their statutory duties to provide notices pertaining to the improvements by petition and failure of their non discretionary duty to warn of dangerous conditions they were aware of prior to the first accident occurring. "The essence of due process is that a person be given notice and an opportunity for hearing." *Mathews v. Eldrige, 424 U.S 319, 348 (1976); R.R.S. 1943, §14-390.* ; Omaha Municipal Codes 1980, Sec. §26-28; 1980 Sec. §26-59 *State law references: Similar provisions, R.R.S. 1943, § 14-3, 119;*1980 Sec. §26-60, *State law references: Similar provisions, R.R.S. 1943, §14-3, 120;* 1980, §18-2, 18-4, 18-5 (App. 30-33) *Stinson v. City of Lincoln, 9 Neb. App. 642, 617 N.W.2d 456 (2000).*

Petitioners alleged a violation of due process rights before the Nebraska Court of Appeals within their questions and arguments pertaining to facts already in the record not being acknowledged or

applied by the district court while granting summary judgment in favor of Respondent. Petitioners cited Nebraska case law before the Nebraska Court of Appeals showing that a lack of a "complete and orderly examination of all the facts and circumstances connected with the case" constitutes an "infringement of rights" *State v. Ryan, 233 Neb. 74, 444 N.W.2d 610 (1989).*

ALL FACTS AND ARGUMENTS PERTAINING TO ESTOPPEL WERE SUFFICIENTLY PLEADED BEFORE THE LOWER COURTS FOR CONSIDERATION.

Nebraska law states "A party entitled to estoppel need not in all cases formally plead the estoppel, and if the facts constituting the estoppel are in any way sufficiently pleaded, he is entitled to the benefit of the law arising therefrom." *Greer v. Chelewski, 76 N.W. 2d 438, 162 Neb 450.*

A recurring theme throughout Respondent's Brief in Opposition is the contention that arguments and facts were not before the lower courts to consider. In fact, a reading of the Order of the District Court and Opinion of the Nebraska Court of Appeals would have the reader convinced there was not much of a record other than the original complaint before the district court. In fact, the full record before the Douglas County District Court consists of 335 page transcript and Bill of Exceptions, 19 exhibits. For this very reason Petitioners included an intensive Appendix

and numerous references to the record within their Petition for this Court to review.

The record will speak for itself. What this Court will find upon examination of the full record is Petitioners have genuine facts and law behind every argument truthfully presented to the lower courts in a respectful manner, not "creative mischaracterization or manipulation of facts" as alleged by Respondent.

Respondent has chosen not to acknowledge or rebut certain facts that are central to the arguments in our Petition. As we could have predicted they remain silent on the facts and arguments regarding waiver, estoppel, or continuing tort that are most relevant to determining that summary judgment was improper and Respondent's reliance on a statute of limitations defense is misplaced.

Below are facts in the record before the granting of summary judgment and have not been acknowledged, opposed, analyzed, or applied at any time within this case by Respondent, the Douglas County District Court, the Nebraska Court of Appeals or the Nebraska Supreme Court.

Petitioners want to underscore the importance of certiorari to reverse the abuse of Petitioner's due process rights concerning the lower courts' lack of applying the following relevant facts on the record while granting and affirming summary judgment in favor of the Respondent.

1. Improvements were designed by a private engineering firm on behalf of West Corporation, approved by Respondent, constructed at a public intersection for the benefit of private business to improve traffic flow from an anticipated increase in traffic volume due to business expansion and related construction of a bridge overpass. (App. 81) (T171-T187) (The Respondent incorrectly states that the improvements were designed by Omaha Public Works See Brief in Opp. Page 12 Fact # 25.)

2. That Respondent City of Omaha failed to provide notice to or obtain signature from any owner of Petitioner's abutting property as required by statute. (T171-T187) *Sec. 26-59. Examination of petition. Omaha Mun. Code 1980, § 26-59; R.R.S. 1943 §14-3,119. Sec. 26-60. Publication of notice. Omaha Mun. Code 1980, § 26-60 (See App. 27)*

3. The actual Development Agreement and Improvements that abut Petitioners' property appear only in Resolution 23 that was introduced, hearing held and adopted within 24 hours. The t-intersection improvements are not referenced in any way or shown in drawings included in the related ordinances 35432 and 35637. (These facts stated in error by Respondent see Brief In Opposition Page 12, Facts 26 and 27.) (T171-T187) (T141-T159)(T188-T193)

4. The accidents occurred at the time of the anticipated heavy traffic volume increases that were discussed at a hearing not disclosed to any owner of Petitioners' property or to the public. Project was approved on this day despite overwhelming written opposition from businesses informed of the improvements. (T335-336 audio-tape)

5. Respondent City of Omaha was aware of dangerous conditions being created by said improvements leading to increased traffic volume and failed in their non discretionary duty to warn any owner of Petitioner's property as required by Nebraska law. *Stinson v. City of Lincoln, 9 Neb. App. 642, 617 N.W.2d 456 (2000).* (T323-334) (T335-336 audiotape)

See Also Petition App. 94-97 for further references showing the all elements of estoppel are present.

CONCLUSION

Writ of Certiorari should be granted to allow the full record and related law to control the direction of this case for the very first time

The Nebraska Courts have violated Petitioners' due process rights by refusing to acknowledge and apply facts that would render the granting and affirmation of summary judgment improper and unjust. These actions constitute a radical departure from the usual course of judicial

proceedings and should invoke the supervisory powers of the United States Supreme Court to intervene on behalf of Petitioners.

Other state courts have determined that summary judgment during ongoing discovery should be avoided. However, regarding summary judgment while court ordered discovery is pending, we request this Court to consider an opinion that summary judgment is always improper with no instructions, hearings, motions, or stipulation within a reasonable time.

Petitioners urge this Court to request and review the full record including the audiotape of the hearing on Resolution 23, the transcript of the 2 ½ hour deposition of Patricia Gard, the video of oral arguments before the Nebraska Court of Appeals, and the correspondence between the City of Omaha, the Nebraska Department of Roads and the Federal Highway Administration.

For these reasons our Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED,

/s/ Clinton C. Gard
/s/ Patricia Gard
931 N 121 St.
Omaha, NE 61854
(402) 342-3150